BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA F. WHISENAND	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,056,966
STANDARD MOTOR PRODUCTS, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the November 14, 2011 preliminary hearing decision entered by Administrative Law Judge Marcia Yates.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not give timely notice of her alleged work injury to respondent under either the old or new act and therefore her request for workers compensation benefits must be denied.

The claimant requests review of whether the ALJ exceeded her jurisdiction in finding that she failed to meet her burden of proof to establish as more likely than not that she had provided timely notice of her industrial injury to her employer.

Respondent argues that ALJ's decision should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing decision should be reversed and the matter remanded to the ALJ for determination of the remaining undecided issues.

Claimant has worked for respondent for 21 years. The last position she held was in shipping and receiving. Her last day of work was April 21, 2011. Claimant testified that

in early 2011 changes were made to her work duties and the job became more physically demanding. She was constantly reaching, pulling, bending, twisting and lifting to unload or break down skids (pallets). Claimant testified that there can be as many as 50 boxes on a skid. The boxes weighed anywhere from 50 to 80 pounds. She also drove a forklift. Claimant performed this work 40 hours a week with no overtime. She testified that the longer she operated the forklift the more she noticed increased pain in her left shoulder and low back. To get in and out of the forklift, claimant had to raise her left arm up to a handle and pull herself up while stepping up with her right leg. She would do this 25-30 times a day.[1]

Claimant testified that the back pain she experienced radiated down into her right leg. She testified that over the years she has gotten used to certain levels of aches and pains, but this pain was more extreme, leaving her barely able to walk to her car. She tried to protect her low back by placing bubble wrap around the seat of the forklift.

Claimant reported left shoulder pain to her primary care physician, Dr. Susan Laningham on January 31, 2011 and again on June 24, 2011. Claimant testified that she discussed her low back pain issues with Dr. Laningham. Claimant was initially examined for her low back complaints by Dr. Laningham on April 6, 2011. She was referred for an MRI on April 19, 2011, which displayed multiple level disc bulging from T11 to L-5, and degenerative changes. She did not want to file a workers compensation claim with respondent because of employee incentives.

Claimant testified that when she reported her complaints to her supervisor, Ron Williams, at the regular staff meeting, Mr. Williams responded that it was "hell to get old" and continued on with his business. Claimant testified that her intent with that conversation was to let Mr. Williams know that the job was too hard for her and that she was having pain.[2] Mr. Williams testified that conversation never occurred.

However, claimant also testified that she understood she was obligated to report to her supervisor that she had a workers compensation accident. But she didn't report a work accident until July 2011 after she was no longer working.

Claimant testified that when Mr. Williams and another supervisor, Brian Bierman asked her what the bubble wrap around her forklift seat was for, she told them it was for her low back. These conversations took place before claimant was laid off on April 21, 2011.[3] Claimant testified that the company lay off was based on seniority and she chose to take it so that she could give her back time to get better. But, her back and shoulder did

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[1] P.H. Trans. at 13-14.

[2] *Id.* at 20.

[3] *Id.* at 22.

not get better. Both Mr. Williams and Mr. Bierman deny that the conversation about the bubble wrap ever occurred.

On a referral by Dr. Laningham, claimant sought additional medical treatment with Sean R. Clinefelter, M.D. Claimant indicated on forms provided by Dr. Clinefelter that changes in her job caused her pain throughout her whole body to the point that, at times, she couldn't walk by the end of the day. Claimant received three epidural injections in her low back from Dr. Clinefelter.

On July 11, 2011, after claimant told her supervisor that the pain she was having was from her job, she was sent to an authorized physician by respondent .[4]

The authorized physicians at OHS recorded a date of injury of July 1, 2011. However, the July 14, 2011 report also notes claimant's back pain was present before her layoff in April 2011. The OHS doctors provided claimant with treatment recommendations and work restrictions as noted in the July 14, 2011 report. However, claimant has yet to receive any treatment. Claimant was given specific temporary restrictions by the OHS authorized treating physicians, of no lifting over 5 pounds, no work above shoulder height, no driving, no squatting or stooping and table or bench height only. Claimant has not been returned to work despite the fact that her lay off ended on August 1, 2011.

Ronald Williams, safety and security manager for respondent, testified that he supervises some of the warehouse facilities and is claimant's direct supervisor. Mr. Williams testified that the breaking down of pallets that claimant described is only done once or twice a week. He also testified that the forklifts are electric powered and do not bounce around on the concrete floors of the warehouses. He refutes claimant's statement that the forklifts operate like Army tanks.

Mr. Williams testified that before April 22, 2011, claimant volunteered to take time off work, but denies claimant telling him it was because the job was too hard or that she was having pain. He testified that he first learned that claimant was alleging a work injury on July 11, 2011, when Rita from human resources called him. After arrangements were made for claimant to fill out an accident report, she was sent to the company physician. Mr. Williams testified that prior to July 11, 2011, claimant never reported to him about a low back or left shoulder injury as a result of repetitive work activities, nor did she ever ask for for medical treatment. The paperwork for this claimed accident was filled out on July 14, 2011.

Mr. Williams testified that respondent has a gainsharing program including goals and incentives for work performance and safety. If the company goes a period of time without any accidents, the money saved is shared with the employees. There is no penalty

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[4] *Id.* at 26.

for reporting an accident and it is not discouraged. If an employee does report an injury, the supervisor is to ask if the injury occurred at work.

Mr. Williams testified that claimant's last assignment with respondent was on the south dock were she worked with two other people. They were not made to do any heavy repetitive lifting and were instructed to help each other with the work.

Marsha Kienzle, human resources supervisor for respondent, testified that one of her jobs is to submit workers compensation claims to the insurance carrier. She testified that in approximately August, 2011 claimant applied for, but did not receive, short term disability benefits. Claimant was not willing to sign paperwork that would leave her responsible for repaying the benefits she received if her claim was determined to be workers compensation. The first Ms. Kienzle heard that claimant was alleging a work-related injury was on July 11, 2011.

Brian Bierman, distribution manager for respondent, testified that he had been claimant's supervisor before February 20, 2011. Mr. Bierman testified that he doesn't recall having a conversation with the claimant about the seat on her forklift being uncomfortable to the point she had to have bubble wrap on her seat to sit on. He never observed claimant with bubble wrap on the seat of her forklift. Prior to July 11, 2011, she never mentioned any kind of work-related injury to him.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ determined that claimant had failed to satisfy the notice requirements of both the old, pre-May 15, 2011 version of K.S.A. 44-520 and the new version placed into effect by the Kansas legislature on May 15, 2011. However, this determination was made without a finding regarding the appropriate date of accident in this matter. Claimant's K-WC E-1, Application For Hearing, filed with the Division on August 1, 2011, alleges a series of accidents up to April 21, 2011.

Under the law in effect prior to May 15, 2011, in workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[5] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

K.S.A. 44-520 (2000 Furse) requires notice be provided to the employer within 10 days of an accident.[8]

K.S.A. 2010 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[9]

Under K.S.A. 2010 Supp. 44-508(d), when a series of repetitive use traumas is claimed, the date of accident must be established by the specific criteria set forth by the Kansas legislature. In this instance, the earliest event from those listed in K.S.A. 2010 Supp. 44-508(d), is when claimant was referred to OHS, for authorized medical treatment on July 14, 2011. The report from that examination returns claimant to work with specific work restrictions. This establishes the date of accident as July 14, 2011. With claimant contacting respondent on July 11, 2011 regarding her alleged injuries, and the accident report being completed on July 14, 2011, claimant satisfies the notice requirements of K.S.A. 44-520 (2000 Furse).

This Board Member will next determine claimant's rights under the new law, placed into effect by the Kansas legislature on May 15, 2011. The 2011 legislative session resulted in numerous amendments to the Kansas Workers Compensation Act. L. 2011, Ch. 55, New Sec. 1 provides in relevant part:

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[7] K.S.A. 2010 Supp. 44-501(a).

[8] K.S.A. 44-520 (2000 Furse).

[9] K.S.A. 2010 Supp. 44-508(d).

(c) the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5, K.S.A. 2010 Supp. 44-508 was amended to read as follows:

44-508. As used in the workers compensation act: . . .(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

. . . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

L. 2011, ch. 55, Sec. 16, K.S.A. 44-520 was amended to read as follows:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

> designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The language of the new version of K.S.A. 44-520 is very similar to the language in the pre May 15, 2011 version. The main and very glaring exception restricts the date of accident to a date no later than the last day worked. Applying this new version of the statute would result in a date of accident on April 21, 2011. Notice of an accident provided by claimant on July 11, 2011 would be outside the allowed statutory time frame.

As claimant last worked for respondent on April 21, 2011, this Board Member finds that the pre May 15, 2011 version of K.S.A. 44-520 applies to this matter. Therefore, claimant provided timely notice of the alleged series of accidents.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant's date of accident under K.S.A. 2010 Supp. 44-508(d) is July 14, 2011. Therefore, under the pre May 15, 2011 version of K.S.A. 44-520, the notice provided to respondent on both July 11 and July 14, 2011 would satisfy the requirements of that

[10] K.S.A. 44-534a.

version of the statute. The determination by the ALJ that claimant failed to timely provide notice of her series of accidental injuries is reversed. The matter is remanded to the ALJ for a determination of the remaining undecided issues.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the decision of Administrative Law Judge Marcia Yates dated November 14, 2011, is reversed and the matter remanded to the ALJ for determination of the remaining undecided issues. The Board does not retain jurisdiction of this matter.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Marcia Yates, Administrative Law Judge